Supreme Court, U.S.
FILED

01 299 AUG 15 2001

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term 2000

WARREN Y.S.C. ALBANO and
CAROLINE C.S. ALBANO,

Petitioners,

vs.

NORWEST FINANCIAL HAWAII, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY VICTOR DUBIN
Dubin Law Offices
7 Waterfront Plaza, Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone: (808) 537-2300
Facsimile: (808) 523-7733

Counsel for Petitioners

QUESTIONS PRESENTED

1. Is the issue *whether a prior state court foreclosure decree extinguishes a borrower's Title 15, Section 1635, extended three-year Truth-In-Lending Act right to rescind a mortgage transaction* governed by the Commerce and the Supremacy Clauses of the United States Constitution, and thus by the provisions of the federal Truth-In-Lending Act, or by the Full Faith and Credit Act, and thus state *res judicata* doctrines?

2. If the issue *whether a prior state court foreclosure decree extinguishes a borrower's Title 15, Section 1635, extended three-year Truth-In-Lending Act right to rescind a mortgage transaction* is governed by the Full Faith and Credit Act, and thus state *res judicata* doctrines, is there any clear controlling *res judicata* precedent in Hawaii judicial decisions extinguishing that federal rescission right?

TABLE OF CONTENTS

	page
Questions Presented	i
Table Of Authorities	vi
I. JURISDICTIONAL STATEMENT	1
II. AUTHORITATIVE PROVISIONS	2
III. STATEMENT OF THE CASE	3
IV. LEGAL ARGUMENT	7
V. CONCLUSION	28
Index To Appendix	---
Appendix	A1

TABLE OF CONTENTS
(continued)

page

SUMMARY OF LEGAL ARGUMENT

1. As A Matter Of Preemptive Federal Legislation, Section 1636 Of Title 15, By Express Language, Does Not Permit The Extinguishment Of A Borrower's Extended Right To Cancel, Notwithstanding A State Foreclosure Decree, Except Upon Either A Sale Of The Property Or The Expiration Of Three Years Following Consummation Of The Original Loan Transaction. 7

a. Federal Law Has Preempted The Mortgage Foreclosure Field With Respect To The Protection Of Rescission Rights Following TILA Violations. 8

b. Federal Courts Have Increasingly Recognized The Preemptive Importance Of TILA Provisions By Overriding State Res Judicata Doctrines In Order To Protect A Borrower's Federal TILA Consumer Rights. 9

c. A Prior State Court Foreclosure Decree Does Not Extinguish A Borrower's TILA Rescission Rights Where Cancellation Occurs Prior To Public Auction And Confirmation Of Sale, Since Res Judicata Is Not Controlling Because The Two Sets Of Claims Have Distinguishing Elements And The Evidentiary Facts Necessary To Prove Each Are Essentially Different. 11

TABLE OF CONTENTS
(continued)

page

d. This Court's 1998 Bellwether Decision In Beach v. Ocwen Federal Bank Provides A Consistent Rationale For Resolving Existing Conflicting TILA Res Judicata Decisions In This Important Area Of Federal Consumer Law. 17

2. Hawaii Case Law Does Not Automatically Extinguish A Borrower's Extended TILA Right To Cancel Merely Because Of A Prior State Foreclosure Decree Where A Borrower's TILA Rescission Claims Have Not Been Pled Or Actually Adjudicated There. 21

a. No Hawaii Appellate Case Has Ever Held That TILA Rescission Claims Are Compulsory And Lost If Not Pled In Defense Of A State Foreclosure Action. 21

b. Far From Encouraging Early Extinguishment Of Consumer Mortgage Defense Claims On Procedural Grounds, The Hawaii Appellate Courts In Recent Years Have Actually Been Pioneering A New Series Of Innovative Judicial Protections For Mortgage Borrowers In Hawaii Which Even Go Way Beyond Any Such Consumer Protections Which Are Recognized In Our Federal Courts. 24

TABLE OF CONTENTS
(continued)

page

c. The Decision Of The Panel Below Not Only Is In Conflict With The Decisions Of The Hawaii Trial And Appellate Courts, Supra, And Every Federal Court That Has Addressed The Issue In Recent Years, Supra, But Will Likely Spawn Great Uncertainty And Create Great Mischief To Borrowers Everywhere Until These Important Cross-Jurisdictional Issues Are Resolved And Settled By This Court. 25

d. The Decision Whether Hawaii Case Law Does Or Does Not Automatically Extinguish A Borrower's Extended TILA Right To Cancel Because Of A Prior State Foreclosure Decree Where A Borrower's TILA Rescission Claims Have Not Been Pled Or Actually Adjudicated There, Should Be -- And Ultimately Will Have To Be – Decided By The Hawaii Supreme Court And Not By This Court Which Should Avoid The Possibility Of Conflicting Decisions. 28

TABLE OF AUTHORITIES

page

CASES

Acquino v. Public Finance Consumer Discount Co., 606 F. Supp. 504 (E.D. Pa. 1985) 10

In re Apaydin, 201 B.R. 716 (Bk. E.D. Pa. 1996) 13

Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998) 18, 19, 23

Brady v. C.F. Schwartz Motor Co., 723 F. Supp. 1045 (D. Del. 1989) 9

Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1997) 9

Daughtery v. First Bank & Trust, 435 F. Supp. 218 (N.D. Ind. 1997) 9

In re Dorsett, 7 Haw. App. 640, 791 P.2d 398 (1990) 24

Elliot v. ITT Corp., 150 B.R. 36 (N.D. Ill. 1992) 9

Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969) 22

Fuller v. Pacific Collections, Inc., 78 Haw. 213, 891 P.2d 300 (App. 1995) 24, 23

TABLE OF AUTHORITIES
(continued)

	page
In re Fryer, 172 B.R. 1020 (S.D. Ga. 1994)	10
GE Capital Hawaii, Inc. v. Miguel, 92 Haw. 236, 990 P.2d 134 (App. 1999)	24
GE Capital Hawaii, Inc. v. Yonenaka, 96 Haw. 32, 25 P.3d 807 (App. 2001)	25
Grogan v. Garner, 498 U.S. 279 (1991)	16
Hart v. Clayton-Parker, 869 F. Supp. 774 (D. Ariz. 1994)	10
Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000)	25
Kama v. Ameriquest, Case No. 00-17240, Ninth Circuit Court of Appeals	14, 26
In re Laubach, 77 B.R. 483 (E.D. Pa. 1987)	12
In re Marshall, 121 B.R. 814 (C.D. Ill. 1980)	10
Matsushima v. Rego, 67 Haw. 556, 696 P.2d 843 (1985)	23
Myers v. Federal Home Loan Mortgage Co., 174 B.R. 122 (Bk. D. Mass. 1994)	8

TABLE OF AUTHORITIES
(continued)

	page
N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System, 473 F.2d 1210 (2nd Cir. 1973), cert. denied, 414 U.S. 827 (1973)	7-8
Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980)	21
Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985)	11, 16
Rowland v. Novus Financial Corp., 949 Supp. 1447 (D. Haw. 1996)	8, 11
Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354 (D. Ariz. 1989)	11, 28
Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974)	10
Tokyo Investment Services (International) v. Gilman, First Circuit Court, State of Hawaii, Civil No. 92-1459-04	16, 21
Walker v. Contimortgage, 232 B.R. 725, (N.D. Ill. 1999)	14
White v. World Finance of Meridian, Inc., 653 F.2d 147 (5th Cir. 1981)	21

I. JURISDICTIONAL STATEMENT

Two separate yet identical Petitions for Writs of *Certiorari* are being simultaneously filed in this Court from Hawaii by Petitioners Mr. and Ms. Albano ("Albanos") and by Petitioner Ms. Menor ("Menor"), seeking joint review of identical Ninth Circuit Court of Appeals' decisions which affirmed separate district court dismissals of their Truth-In-Lending Act complaints in separate cases below on the same *res judicata* grounds.

The Petitions should, therefore, be considered together, and thus have been jointly prepared, although separately filed procedurally.

In Albano, which was chosen by the Court of Appeals to be the lead case, its published Opinion was filed on March 30, 2001.

In Menor, a Memorandum Opinion was filed on April 3, 2001, based upon its Opinion entered in Albano.

Both Albanos and Menor sought reconsideration *en banc*, which was denied by their identical Ninth Circuit Court of Appeals' merits panel on the same day, May 17, 2001

The jurisdiction of the district court in both cases was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review both requests for a Writ of *Certiorari*, each timely filed within ninety days of the denial of reconsideration, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The Court of Appeals' decisions being challenged, and the relevant text of the principal governing provisions of law, are set forth in the *Appendix* to this Petition, and are as follows:

Published Opinion Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed March 30, 2001 (Albanos);

Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed May 17, 2001 (Albanos);

Memorandum Decision Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed April 3, 2001 (Menor);

Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed May 17, 2001 (Menor);

Article I, Section 8, Clause 3, Of The United States Constitution (Commerce Clause);

Article IV, Section 1, Of The United States Constitution (Full Faith And Credit Clause);

Article VI, Clause 2, Of The United States Constitution (Supremacy Clause);

Section 1635 Of Title 15 Of The United States Code (Truth-In-Lending Act);

Section 1738 Of Title 28 Of The United States Constitution (Full Faith And Credit Act);

Rule 13 Of The Hawaii Rules Of Appellate Procedure (Certification By Federal Courts Of State Law Questions To Hawaii Supreme Court For Decision).

III. STATEMENT OF THE CASE

Both Albanos and Menor were served with state court foreclosure complaints in Hawaii claiming that they had defaulted in the payment of their respective residential mortgages.

Neither answered, and defaults were requested and entered against them by court clerks.

Summary judgment motions were then filed against each, neither appeared for the hearing of those motions, foreclosure decrees were entered against then, and neither appealed.

Instead, after summary judgment, but before any public auctioning of their property and before state court confirmation of sale, and within three years of the consummation of their respective mortgage loans, both sent their lenders written cancellation notices alleging Truth-In-Lending Act ("TILA") violations and demanding rescission, and both separately filed TILA complaints in the Hawaii district court.

Their lenders, nevertheless, had the auction sales to themselves, respectively, confirmed, and title to their respective property was transferred to their lender.

Their separate TILA cases were subsequently dismissed by the district court on res judicata grounds; both appealed; and the Ninth Circuit Court of Appeals affirmed the dismissals in both cases, entering a published Opinion in Albano, and a Memorandum decision in Menor.

The following, briefly, are the relevant, detailed facts in Albano:

The Albanos entered into two successive 1994 mortgage transactions on March 15, 1994, and on July 11, 1994, each of which qualified as a TILA Section 1635 security interest governed by federal law.

On May 27, 1996, Norwest filed a foreclosure suit in state court against the Albanos, alleging a loan default. Summary judgment was granted on January 13, 1997. Unrepresented by counsel, the Albanos did not answer the complaint nor attend the summary judgment hearing.

Thereafter, on March 4, 1997, and March 12, 1997, within three years of loan consummation, pursuant to the extended rescission period set forth in Section 1635(f), and before the subject property had been auctioned or any foreclosure sale confirmed, Caroline Albano sent two successive notices of cancellation to Norwest, demanding a TILA rescission, which was immediately refused.

Caroline Albano thereafter filed a TILA complaint in district court on March 14, 1997. Norwest filed a motion for summary judgment on November 2, 1998, which was heard on January 25, 1999.

The district court, specifically relying upon two of its earlier decisions in similar TILA cases, and rejecting a recent, contrary state court ruling, granted the motion and entered Final Judgment against the Albanos, concluding that the action was barred by Hawaii law pursuant to the doctrine of *res judicata* since there had been an unappealed, intervening state foreclosure judgment entered between the same parties, which the district court concluded it was bound by, pursuant to the federal Full Faith and Credit Act.

The underlying facts in Menor are substantially identical to those, *supra*, in Albano:

Menor entered into a mortgage transaction on August 3, 1995, which qualified as a TILA Section 1635 security interest governed by federal law.

On July 16, 1996, Finance Factors filed a foreclosure suit in state court against Menor and her co-borrowers, alleging a loan default, and summary judgment against them was granted on October 23, 1996, who, unrepresented by counsel, did not answer the complaint nor attend the summary judgment hearing in state court.

Thereafter, on July 31, 1998, within three years of the consummation of her loan, pursuant to the extended rescission period set forth in Section 1635(f), and before the subject property had been auctioned or any foreclosure sale confirmed, Menor sent a notice of cancellation to Finance Factors, demanding a TILA rescission, which was immediately refused.

Menor thereafter filed a TILA complaint in district court, *pro se*, on August 3, 1998. Finance Factors filed a motion to dismiss or for summary judgment on August 28, 1998, which was heard on December 7, 1998.

The district court, relying specifically upon two of its earlier decisions in similar TILA cases, and rejecting a recent, contrary state court ruling, granted the motion and entered Final Judgment against Menor, concluding that the action was barred by Hawaii law pursuant to the doctrine of *res judicata* since there had been an unappealed, intervening state foreclosure judgment entered between the same parties, which the district court concluded it was bound by, pursuant to the federal Full Faith and Credit Act.

The written district court decisions in both cases were virtual carbon copies, as it were, of one another.

There was one important factual difference in the two cases, however, which the Court of Appeals overlooked.

In Albano, the state circuit court sitting on Maui, in its written foreclosure decree ordered that the Albanos, although allowed to stay in their home until confirmation of sale, "are perpetually barred of and from any and all right, title, and interest in the mortgaged property and any part of the mortgaged property, except as otherwise ordered by this Court" (Order and Decree, Paragraph 12).

In Menor, however, the state circuit court sitting in Honolulu, in its written foreclosure decree ordered that Menor, although also allowed to stay in her home until confirmation of sale, "will be perpetually barred of and from any and all right, title and interest in the Property or any part thereof *upon closing of the sale herein authorized*" (Order and Decree, Paragraph 6, Emphasis Added).

In practice, however, all circuit courts in Hawaii have always allowed residential borrowers, notwithstanding the wording of the foreclosure decree, to halt a foreclosure by bringing their mortgages current prior to any confirmation of sale, probably because there is no equity of redemption in Hawaii law, and even in Albano the Court retained jurisdiction in its foreclosure decree, *supra*, "as otherwise ordered."

The same merits panel of the Ninth Circuit Court of Appeals heard both appeals, and affirmed, however, holding that a final judgment of foreclosure in Hawaii automatically precludes any right to rescind the underlying mortgage transaction. The Court of Appeals specifically limited its decision in the two cases however to Hawaii. The respective decisions of the Court of Appeals in Albano and in Menor, including its denial of their separate petitions for reconsideration *en banc*, are set forth in full in the *Appendix*.

IV. LEGAL ARGUMENT

There are two fundamentally important cross-jurisdictional issues of federalism presented in both the Albano and the Menor appeals which only this Court can finally settle, neither of which, although fully briefed, did the Ninth Circuit Court of Appeals' panel either address or even apparently research below:

The first such jurisdictional issue concerns the supremacy of federal consumer laws, such as TILA, which Congress has specifically enacted to control predatory interstate banking practices, and whether those federal statutes can be modified or curtailed, and if so, to what degree, by state judicial doctrines, as has occurred here.

The second such jurisdictional issue concerns the extent to which federal courts should interpret for themselves state law doctrines which are unclear, or whether they should certify such questions to the highest courts of the States for decision first instead.

1. As a matter of preemptive federal legislation, Section 1636 of Title 15, by express language, does not permit the extinguishment of a borrower's extended right to cancel, notwithstanding a state foreclosure decree, except upon either a sale of the property or the expiration of three years following consummation of the original loan transaction.

"The avowed purpose of the Consumer Credit Protection Act, enacted in 1968 after eight years of Congressional consideration," it important to recall, "was . . . to remedy unscrupulous and predatory creditor practices throughout the nation," N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve

System, 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

"However, Congress left the door open for states to create their own truth-in-lending acts, so long as the disclosures required were substantially the same as those of TILA," and "the Federal Reserve Board (the 'Board') is given the option to determine whether a particular state's laws" comply, Myers v. Federal Home Loan Mortgage Co., 174 B.R. 122, 125 (Bk. D. Mass. 1994).

a. Federal law has preempted the mortgage foreclosure field with respect to the protection of rescission rights following TILA violations.

The power of Congress to preempt state laws through the Commerce and the Supremacy Clauses of the United States Constitution is well established.

It has been held, for instance, by contrast, that there is no corresponding "important state interest" in a state foreclosure action involving purely private rights, Rowland v. Novus Financial Corp., 949 F. Supp. 1447, 1457 (D. Haw. 1996).

In 1968, when Congress rightfully responded to numerous horror stories of lender overreaching and passed various consumer legislation, including TILA, designed to afford protection to borrowers faced with confusing and frequently deceptive loan and mortgage terms and documentation, it expressly authorized the awarding in appropriate cases of both actual and statutory damages and gave consumers the right of rescission, as "private attorneys general," to place checks on numerous, notorious banking abuses.

Since then, both our federal and our state courts have grappled with the various cross-jurisdictional issues that have understandably arisen, especially

where lenders, as here, bring suit first for foreclosure in state court and borrowers file separate federal actions.

b. Federal courts have increasingly recognized the preemptive importance of TILA provisions by overriding state *res judicata* doctrines in order to protect a borrower's federal TILA consumer rights.

At first, some federal district courts refused to allow such federal consumer suits if a foreclosure action had been filed first in state court, based upon *res judicata* doctrines and Rule 13 compulsory counterclaim theories, *see, e.g.*, Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1977), while other district courts, recognizing the unique TILA protection that was clearly intended by Congress, held otherwise, *see, e.g.*, Daughtery v. First Bank & Trust, 435 F. Supp. 218 (N.D. Ind. 1977).

More recently, however, there has been an avalanche of federal and state court decisions in all Circuits and in state court jurisdictions alike holding TILA claims to be superior to state law doctrines, thus permissive counterclaims in nature, in order to protect the consumer's federal statutory rights, all of which decisions the Ninth Circuit panel deciding Albano and Menor appears to have ignored, although the expressed rationale for such decisions has admittedly often been confusing; *see, e.g.*:

Brady v. C.F. Schwartz Motor Co., 723 F. Supp. 1045 (D. Del. 1989) (TILA claims permissive and state court judgment in favor of lender on note was held not *res judicata*);

Elliot v. ITT Corp., 150 B.R. 36 (N.D. Ill. 1992) (debtor's failure to dispute creditor's claim in bankruptcy and to list TILA claim, and confirmation of

plan, did not preclude debtor from asserting TILA claim in bankruptcy later);

In re Fryer, 172 B.R. 1020 (S.D. Ga. 1994) (creditor's motion to dismiss TILA claim based on *res judicata* was denied);

In re Marshall, 121 B.R. 814 (C.D. Ill. 1980) (TILA claim held not a compulsory counterclaim and thus not lost in earlier action);

Acquino v. Public Finance Consumer Discount Co., 606 F. Supp. 504, 511 (E.D. Pa. 1985) (holding "to prevent a later recovery for a rescission violation would undercut the penalty Congress clearly decided to impose");

Sosa v. Fite, 408 F.2d 114 (1974) (residence actually sold at state foreclosure sale to a third party, but borrower thereafter still permitted to sue in federal court to enforce rescission rights under TILA and total rescission nevertheless was ordered); and

Hart v. Clayton-Parker, 869 F. Supp. 774 (D. Ariz. 1994) ("every court of appeals to consider the issue . . . has concluded that TILA claims and underlying loan transactions do not arise out of the same transaction or occurrence and are thus not subject to the compulsory counterclaim provision of Rule 13(a)").

Decisions this past decade in federal district courts in the Ninth Circuit as well, at least until the ones now complained of below, have closely mirrored the modern trend, *supra*, allowing TILA rescission claims to be brought in federal courts even though borrowers had either earlier lost state court foreclosure suits or had even earlier prevailed in TILA material nondisclosure suits of their own in state court seeking only damages, or had existing state foreclosure suits still ongoing while not maintaining TILA rescission

counterclaims there but instead asserting affirmatively TILA claims in federal district courts.

Thus, in Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354 (D. Ariz. 1989), cited below as however not controlling, that Ninth Circuit district court held that a previously successful state court adjudication of a TILA disclosure violation by a borrower did not bar a later federal suit for rescission under TILA, specifically deeming such a counterclaim to be permissive, in direct reliance upon an earlier *en banc* decision of the Ninth Circuit Court of Appeals in Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (see 713 F. Supp. at 358), which the Albano and Menor merits panel below did not even cite or discuss.

And, the district court in Hawaii itself earlier, in Rowland v. Novus Financial Corporation, 949 F. Supp. 1447 (D. Haw. 1996), held a TILA suit in federal court is not barred even if there is an ongoing, prior state court foreclosure action in which the borrower was not maintaining any state court counterclaims, despite the possibility of conflicting results between jurisdictions.

c. A prior state court foreclosure decree does not extinguish a borrower's TILA rescission rights where cancellation occurs prior to public auction and confirmation of sale, since *res judicata* is not controlling because the two sets of claims have distinguishing elements and the evidentiary facts necessary to prove each are essentially different.

Judge Rosenberg, for instance, when confronted with the same identical issue as here, rendered his decision in Smith, *supra*, based his contrary conclusions, unlike the panel that decided Albano and Menor, although it referenced his decision in Smith in the Albano Opinion itself, on the earlier *en banc* Ninth Circuit Court of Appeals decision in Piatt,

supra, explicitly recognizing that *res judicata* principles barring re-litigation were not controlling, as Piatt made clear, "where the legal theories of the claim were different under federal law than they were under state law," 713 F. Supp at 358, as when "the claims themselves have distinguishable elements from the cause of action that was litigated in state court, and the evidentiary facts necessary to prove the claim were distinct from those presented in state court," 773 F.2d at 1035, and only after District Judge Rosenberg had additionally conducted a careful review of TILA rescission decisions in other Circuits as he carefully explained in his decision in Smith.

Judge Rosenberg, thus applying Piatt, unlike the panel below, expressly found that "the res judicata doctrine is viewed in a different light when the [federal] right to rescission is involved because this right has a substantive quality," 713 F. Supp. at 358, and that 'the legal issue of rescission is a new cause of action which was not litigated in the state court" in the customary have-you-paid-your-mortgage foreclosure case, 713 F. Supp. at 359.

What completely contradicts the panel's decision here is the fact that in Smith, 713 F. Supp. at 355, and in another federal case upon which it also relies, Laubach v. Fidelity Consumer Discount Co., 77 B.R. 483 (Bk. E.D. Pa. 1987), instead of any consideration or reliance being placed upon the vagaries of each State's apparent *res judicata* laws, it was in stark contrast held that *res judicata* did not even bar a subsequent TILA rescission claim in federal court after a notice of cancellation was sent, even though in both Smith and Laubach the borrowers had filed a counterclaim in state court seeking damages for TILA disclosure violations first (as opposed to rescission claims) and had lost summary judgments; whereas in Menor and in Albano, no TILA claim whatsoever of any nature was ever even presented or litigated in any state court anywhere – only a default taken against

Albanos and Menor on purely state-law mortgage default-in-payment claims.

Since Smith, every federal court that has examined that issue has held, except for the panel below, that the federal TILA rescission right survives a foreclosure judgment and even a sale and even a subsequent loss of the property no less.

Thus, in In re Apaydin, 201 B.R. 716, 721-722 (1996), the United States Bankruptcy Court for the Eastern District of Pennsylvania viewed federal TILA rescission claims more consistently with the reasoning found in the Ninth Circuit Court of Appeal's *en banc* decision in Piatt, and totally differently than has the panel now done in Albano and in Menor:

> The right of rescission does not emanate from plaintiffs' mortgage such that it disappears after the mortgage is merged with the judgment. Rather, plaintiffs rescission rights arises [sic] from TILA and the regulations promulgated thereunder. 15 U.S.C. 1635; 12 C.F.R. 226.23. Thus, the fact that the mortgage no longer exists is immaterial to whether the plaintiffs retain the ability to rescind Citicorp's security interest in their house. This right continues to exist based on TILA which, unlike the terms of plaintiffs' mortgage, is unaffected by the entry of the [foreclosure] judgment.
>
> * * * *
>
> According to TILA itself, the right to rescind a transaction terminates only after the passage of three years or the sale of the property. 12 C.F.R. 226.23(a)(3). The TILA statute and regulations are, in fact, clear and unambiguous on this point.

Other federal courts recently have similarly viewed TILA rescission rights as not affected by state mortgage foreclosure judgments, the latest case precedent being the highly persuasive decision of Judge Schmetterer in Walker v. Contimortgage, 232 B.R. 725 (N.D. Ill. 1999) (holding that an earlier obtained state court foreclosure judgment did not extinguish the federal TILA right to rescind within the extended three-year period where, as in Albano and in Menor, no sale had yet taken place).

In fact, there is not a single published opinion in all of American law supporting the Albano and the Menor panel's narrow reading of the survivability of federal TILA rescission rights as here.

Indeed, until recently even in the District of Hawaii it had long been the view that federal TILA rescission rights survived a Hawaii state foreclosure judgment, notwithstanding state *res judicata* doctrines, so long as the extended three-year period had not yet expired.

For instance, in the celebrated Kahalehau case in the district court in Hawaii, its "Order Denying Plaintiff's Motion For A TRO," filed March 28, 1994, in Civil No. 94-00164 ACK, in the United States District Court for the District of Hawaii, appearing in the appellate record of yet another related TILA/*res judicata* case awaiting decision by the Ninth Circuit Court of Appeals, presumably to be decided based on Albano as well, if not reverse, Kama v. Ameriquest, Case No. 00-17240, Judge Kay expressly held there, consistent with the reasoning found in Smith and in Piatt a few years earlier, that TILA claims were indeed "permissive" in Hawaii and that a prior Hawaii state court foreclosure judgment in which the TILA claims were neither considered nor addressed in the state court's findings of fact or conclusions of law was not *res judicata*, contrary to the new view of the panel

below which now would bar a subsequent action by the borrower in federal court seeking to rescind:

> The law in this District is that the debtor's TILA claim against a creditor and the creditor's foreclosure claims against a debtor involve different issues of law and therefore are not compulsory counterclaims, even though they may arise out of the same transaction. Dias v. Bank of Hawaii, 764 F.2d 1292, 1294 n.1 (9th Cir. 1985); Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116, 1122 & n.20 (D. Haw. 1976). . . . . Hence, this Court finds that Plaintiff's TILA claim is a permissive counterclaim, and therefore she was not required to raise it in the state-court proceeding.

It was even shown to the district court below and on appeal, in both Albano and in Menor, that the Honolulu circuit court foreclosure judge had held as late as 1998, as Judge Kay had in Kahalehau, *supra*, in a state court case that a TILA rescission was allowed in state court even though not pled during the foreclosure part of the case, and after a foreclosure decree had already been granted and not appealed, which brought this revealing response from the district court embodied in the written Menor dismissal order, who preferred to ignore, as the panel in Albano and in Menor similarly did, the written, *albeit* unpublished, opinion of the Honolulu state foreclosure judge sitting but one block away from the federal court, in favor of the district court's own view of what Hawaii's *res judicata* law was supposed to be:

> Plaintiff also refers to a recent unpublished order from the Circuit Court of the First Circuit, State of Hawaii [Gilman] which held that a claim for rescission under the TILA was a permissive counterclaim and allowed to proceed. The state court bases its decision upon . . . Smith . . . . This Court disagrees with the conclusion in Gilman . . . .

There is, moreover, nothing new in such a "federal supremacy" approach as that taken in Piatt and in Smith, as this Court in a somewhat related context in Grogan v. Garner, 498 U.S. 279 (1991), made clear.

In Grogan, this Court was faced with apparent tension, as here, between the viability of a special federal right versus the *res judicata* effect of a prior state court judgment -- the question there being whether under federal bankruptcy laws a state court judgment involving a finding of "actual fraud" against a Chapter 11 Debtor was dischargeable if the burden of proof underlying the state court judgment, otherwise *res judicata*, was not "clear and convincing evidence" but the lesser "preponderance" standard.

The actual decision in Grogan, adopting the lesser standard as what Congress intended, is not directly relevant here. Instead, what is relevant in Grogan is that this Court in its reasoning proceeded in much the same manner as did the Ninth Circuit Court of Appeals *en banc* in Piatt; that is, this Court recognized that the federal issue was different than the issue decided in state court by the state court judgment, and that it had to make an independent interpretation of Congressional intent to establish a uniform rule for the protection of a special federal right

– in that case, debtor dischargeability, and in our case, borrower cancellation.

One passage of the Opinion in Grogan is especially instructive here: "Congress amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the validity of the underlying claim," 498 U.S. at 289.

That is precisely one of the central points in this Appeal.

There is a difference between whether a state court has found in a mortgage foreclosure case that there has been a default in payment of a mortgage loan by a borrower, thus for state purposes finding the underlying mortgage "valid," and the entirely separate issue as determined in Smith and in Apaydin and in Walker, *supra*, for instance, when presented to a federal court as to whether that same borrower has nevertheless exercised his or her federal TILA rescission right within the extended three-year option period under this Court's decision in Beach, *supra*, thus trumping the state court foreclosure judgment as a result of independent and overriding federal interstate commerce and banking policy concerns.

d. This Court's 1998 bellwether decision in Beach v. Ocwen Federal Bank provides a consistent rationale for resolving existing conflicting TILA res judicata decisions in this important area of federal consumer law.

To many, since both a lender's and its borrower's claims appear to arise out of the same transaction, the modern trend has seemed to conflict with traditional *res judicata* concepts; hence, although the modern view is to protect TILA claims from *res judicata* extinguishment, there has not yet fully emerged in the cases cited a truly consistent rationale

for reconciling the various conflicting decisions – most courts still painting, as it were, with a very broad brush -- the vast majority of state and federal courts now holding TILA claims to be "permissive" in order to defeat *res judicata* arguments, while a few jurisdictions still continue to find them "compulsory" in the absence of any previous bright-line rationale.

Much of the past confusion, it is submitted, may have resulted from a failure to recognize that where a foreclosure action has been filed first in state court, in certain situations a borrower's TILA claim subsequently in federal court may indeed be "permissive," while in other situations it might more properly be viewed as "compulsory," depending upon which *res judicata* principles are actually applicable.

Such common *res judicata* situations, for instance, often are of two varieties: (1) where the TILA claim has already been litigated in state court and (2) where the TILA claim existed at the time that the foreclosure suit was served and a cancellation notice sent, but was not included as a counterclaim with the borrower's pleadings.

What concerns us here, however, is a third type of situation: (3) where the TILA claim was not raised in the prior suit and the cancellation notice was not sent prior to the service of the foreclosure complaint or prior to the entry of the state court foreclosure judgment, and it is in the latter set of circumstances where the decision of this Court in Beach, *supra*, could finally provide a consistent *res judicata* rationale in TILA actions.

For, prior to this Court's 1998 decision in Beach, the TILA three-year extended right to rescind was everywhere looked upon as a "statute of limitations," during which period a borrower had to exercise his or her right of rescission -- the cause of action, as it were, having started to accrue at the time of the TILA

violation at loan consummation when the loan was actually made.

It was only in a defensive posture, opposing foreclosure, that the courts, before Beach was decided, had considered the borrower's defense to be one of "common law recoupment" -- which tolled the statute of limitations indefinitely to allow for a TILA counterclaim beyond the three-day or three-year periods.

Thus, prior to Beach, the borrower's claim for rescission as well as for damages was conceptualized as arising out of the same loan transaction, invoking -- and logically satisfying the dual requirement of -- Rule 13, so as to be viewed, as the district court saw it below, as "compulsory," the claim both arising out of the same transaction and being ripe at the time the complaint was served.

However, Beach held that the TILA rescission right was a right to be exercised or elected, identical to an option, or lost, within the extended three-year period -- and was not a statute of limitations where the right to rescind had accrued at the time of the TILA violation at loan consummation, the key distinction underlying Beach.

The significance of that holding now provides us with, it is submitted, a consistent rationale for the new modern trend in both the federal and state jurisdictions which now consider a TILA rescission claim to be *permissive*, for it is only when the Beach right to rescind is actually exercised and the lender refuses to terminate the security interest that the cause of action of the borrower to enforce his or her cancellation arises, and that could be before or after a state court foreclosure suit is filed, depending upon whether the TILA rescission right is timely exercised before or after the state foreclosure suit is filed and served.

In Albano and in Menor, that right was exercised, to render it a *permissive* counterclaim, not only after the state foreclosure suit was filed, but also after the foreclosure judgment was entered, but before any public auction or any confirmation of sale.

The intent of Congress in enacting Section 1635(f) is clear from the plain language of the statute itself:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first . . . .

Once the rationale underlying Beach is therefore thus applied to such Rule 13-related TILA cases as here, it becomes increasingly easier to understand and to intelligently sort through prior and often conflicting federal and state court precedents, *supra*, as that rationale serves to highlight a variety of factors that may properly determine whether a lender's or a borrower's separate suit -- after a state court filing – should be considered as either permissive or compulsory for *res judicata* purposes – which will logically depend, for example, at what stage in the process a cancellation notice was sent, whether the lender or the borrower sued first, whether a default in the payment of the loan actually occurred, and/or whether the borrower is seeking rescission and/or damages.

It could, for instance, clearly be either, depending upon the various timing of the cancellation notice.

Thus, under this compromise approach, *res judicata*, for instance, may or may not be a bar to a subsequent federal TILA rescission action.

There are clearly a myriad of possible decision scenarios, and the recent cases, except for the decisions below, clearly illustrate those logical differences.

For instance, federal courts have held that TILA rescission actions are not barred even if there has been prior TILA litigation which itself did not involve rescission but involved damage claims, White v. World Finance of Meridian, Inc., 653 F.2d 147 (5th Cir. 1981); In re Laubach, *supra*.

2. Hawaii case law does not automatically extinguish a borrower's extended TILA right to cancel merely because of a prior state foreclosure decree where a borrower's TILA rescission claims have not been pled or actually adjudicated there.

The panel in Albano and in Menor not only ignored the actual decisions of the Hawaii state trial judges, such as in Gilman, *supra*, submitted to it, but misread Hawaii appellate precedent as well.

a. No Hawaii appellate case has ever held that TILA rescission claims are compulsory and lost if not pled in defense of a state foreclosure action.

The Albano and Menor panel interpreted the decision of the Hawaii Supreme Court in Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), to hold that in Hawaii TILA claims are "compulsory," since they supposedly arise out of the same transaction as the lender's foreclosure action brought for nonpayment of the underlying loan.

However, the panel below overlooked the fact that the borrower's counterclaim in Pacific Concrete was not a rescission claim at all, but a Section 1640 damage claim, and since all damage claims based

upon mathematical miscalculations at the time the loan was consummated logically arise out of the same transaction (the first requirement, *supra*, of Rule 13) as does any default in loan payments itself, and exists as a ripe claim when the foreclosure suit is originally served (the second requirement, *supra*, of Rule 13), it is correctly viewed as "compulsory."

However, a rescission election pursuant to Beach, *supra*, that is not made by a borrower until after a state foreclosure suit has been filed against him or her would not satisfy either of the two requirements of Rule 13, and would thus be classified as "permissive" in Hawaii, notwithstanding Pacific Concrete, a result consistent with the state court's decision in Gilman, *supra*, as well.

It is ironic, indeed, that the panel below turned the decision of the Hawaii Supreme Court in Pacific Concrete squarely on its head, to favor the lender, since that 1980 decision was a landmark holding, explicitly seeking to protect and to extend consumer's rights in Hawaii under the century-old Hawaii doctrine of "common law recoupment," by recognizing that disclosure mistakes in the terms of a loan arose out of the same transaction -- not to make TILA Section 1635 rescission claims "compulsory," but to provide for related TILA Section 1640 damage claims as offsets that had already ripened by tolling the statute of limitations so that lenders could not wait adroitly to foreclosure until the statute of limitations had run on a borrower's claims, in order to discipline overreaching lenders so as to avoid undercutting the aims of such consumer protection laws, 62 Haw. at 342.

Similarly, the panel's conclusion that Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969), in any way created a state law doctrine that bars a subsequent TILA rescission claim in federal court on *res judicata* grounds was another unfortunate misreading of Hawaii law, since Ellis involved a non-TILA, common law

rescission claim that was both part of the subject transaction there and had accrued at the time the state court foreclosure action was filed in Ellis, which within the Beach *res judicata* rationale suggested, *supra*, would indeed be "compulsory," but would have nothing to do whatsoever with extinguishing an unpled and unadjudicated TILA statutory rescission claim, and clearly not in any way would be determinative here.

The panel has additionally misread Fuller v. Pacific Collections, Inc., 78 Haw. 213, 218-19, 891 P.2d 300, 305-306 (App. 1995), which addressed, *inter alia*, the preclusive effect of a state court default judgment.

The Fuller Court, after distinguishing as a matter of state law between the doctrine of *res judicata* and the more limited doctrine of collateral estoppel, 78 Haw. at 218-219, first found "a default judgment to be a final judgment to which collateral estoppel [and not *res judicata*] applies," and then went on to hold in that case that "the doctrine of collateral estoppel would apply to bar relitigation of the amounts listed as owing on all four district court judgments," 78 Haw. at 219, since those amounts were stated in the pleadings to which the default was applied.

The panel decision apparently mistakenly concluded from that that Fuller held that "'[A] default judgment is a final judgment to which' res judicata principles apply," when in fact that conclusion is nowhere found in Fuller.

The passage quoted by the panel from Fuller actually states that only the doctrine of collateral estoppel applies to default judgments in Hawaii, and only goes on to make a point about an exception for void judgments by analogizing to void judgments as an exception to *res judicata*, citing with a "Cf." prefatory signal a 1985 Hawaii Supreme Court case only applicable by analogy, Matsushima v. Rego, 67 Haw. 556, 559, 696 P.2d 843, 846 (1985), itself however

making clear that default judgments in Hawaii cannot determine issues beyond those actually pled.

Had the panel researched further, it would have discovered that the distinction between *res judicata* and collateral estoppel, especially in a default judgment context, is immense and alive in Hawaii, as the same Fuller Court itself explained in more detail earlier in the controlling authority it itself cites in its Fuller opinion, 78 Haw. 213 at 219, In re Dowsett, 7 Haw. App. 640, 644-645, 791 P.2d 398, 401-402 (1990) ("collateral estoppel also requires that, in the prior action, the issues sought to be precluded 'have been both actually litigated and actually decided'"), reasoning strikingly similar to that found in Piatt – yet also overlooked and unaddressed in the panel's published *Opinion* in Albano which produced the *Memorandum* affirmance in Menor.

b. Far from encouraging early extinguishment of consumer mortgage defense claims on procedural grounds, the Hawaii appellate courts in recent years have actually been pioneering a new series of innovative judicial protections for mortgage borrowers in Hawaii which even go way beyond any such consumer protections which are recognized in our federal courts.

There have been a flurry of new appellate decisions in Hawaii in recent years, three in particular, intended to protect borrowers and related TILA rights, in which the undersigned, as in Gilman, *supra*, was the borrowers' trial and appellate counsel, which suggest that the panel below has not keep abreast of appellate developments in that State.

For instance, in GE Capital Hawaii, Inc. v. Miguel, 92 Haw. 236, 990 P.2d 134 (App. 1999), the Hawaii Intermediate Court of Appeals, citing Pacific

Concrete approvingly, imposed upon Hawaii trial courts new Rule 56(e) summary judgment general ledger restrictions, specifically rejecting less demanding federal interpretations of Rule 56(e), despite its now being an identically worded civil practice rule in both jurisdictions.

And, in Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000), the Hawaii Supreme Court made it easier for Hawaii borrowers, among other new evidentiary rights also granted in Keka, to assert a TILA notice-of-right-to-cancel *non*delivery claim in defense of summary judgment and the contrary rebuttable presumption under federal law.

And, just weeks ago, the Hawaii Intermediate Court of Appeals, in GE Capital v. Yonenaka, 96 Haw. 32, 25 P.3d 807 (App. 2001), went even farther than any state or any federal court has yet gone to protect mortgage borrowers, holding that it would overturn any foreclosure summary judgment on appeal where a lender did not submit into evidence its loan general ledger, even if, contrary to all applicable federal appellate precedents, the borrower at the summary judgment hearing had not objected to the foreclosure.

Perhaps the panel below should have weighed the supposed "robustness" of Hawaii's *res judicata* doctrine with the Hawaii appellate court's recently demonstrated robust foreclosure defense public policy.

c. The decision of the panel below not only is in conflict with the decisions of the Hawaii trial and appellate courts, *supra*, and every federal court that has addressed the issue in recent years, *supra*, but will likely spawn great uncertainty and create great mischief to borrowers everywhere until these important cross-jurisdictional issues are resolved and settled by this Court.

Unlike the general, ambiguous language contained in the summary judgment order and foreclosure decree, *supra*, entered by the Second Circuit Court on Maui in Albano, the First Circuit Court in Honolulu in Menor, as did the First Circuit Court also in Kama, supra, clearly stated in its summary judgment order and foreclosure decree, *supra*, that the foreclosure was not to be considered final (or *res judicata* apply), depriving Menor of title, until the auction was confirmed and the sale was actually approved by the state trial court and had actually closed, which was of course after Menor also had sent her timely cancellation letter to her lender as TILA requires and allows.

Thus, the panel's conclusion that in Hawaii there is a so-called "robust" application of the doctrine of *res judicata*, at least in the context of a mortgage foreclosure case is further belied by the actual wording of the foreclosure decree in Menor and by the highly ambiguous "except as otherwise ordered by this Court" language in the foreclosure degree in Albano, as quoted earlier in this Petition, at page 6.

Moreover, notwithstanding the amazing clarity with which the panel found such "robust" *res judicata* doctrines in its view to exist in the case law in Hawaii, Hawaii local practitioners and academicians -- who have recently taken the time to closely study the last three decades of Hawaii decisions which have attempted to apply both *res judicata* and collateral estoppel concepts -- have come to a completely different view than has the panel below, finding, for example, Hawaii's *res judicata* case law somewhat less than robust, instead to be "a tangled web of incoherence," and "Hawaii's long history of confusing decisions . . . a jumbled morass in the law," Endo, *Res Judicata And Collateral Estoppel In Hawaii: One Of These Things Is Not Like The Other*, 3 Hawaii Bar Journal 1, at 1 and 27 (1999).

Absent a precise definition and explanation from the panel as to how precisely to identify and to apply different degrees of "robustness," as it were – if that is to be declared to be the new test in federal court which is going to control whether a federal consumer right is alive or not as applied to differentiate among varying *res judicata* and collateral estoppel doctrines within ultimately all of the fifty States and the District of Columbia, an interpretative test which has yet, perhaps thankfully, to find its way into Black's Law Dictionary, and absent intervention by this Court now, important TILA protections enacted by Congress might literally drown in a quagmire of hopelessly divergent district by district and circuit by circuit holdings.

For instance, absent review here, it will now clearly depend not upon the facts of a particular case but only upon the jurisdiction of suit whether borrowers can exercise federal TILA rescission rights successfully; thus, in the operative circumstances presented here – on the same identical set of facts -- from now on – if not reviewed – borrowers seeking the assistance of federal courts might lose their homes in Hawaii (Albano), but not in Arizona (Smith), and not in Pennsylvania (Apaydin), and not in Illinois (Walker), and perhaps nowhere else but Hawaii.

Or, much worse, is the availability of so important a federal right to be allowed by this Court to vary even among counties within States within Circuits, depending upon, for instance, as we have learned, the wording of a particular county court's foreclosure decree, such as the differing language, *supra*, found in Albano on Maui, as opposed to that found in Menor in Honolulu? And what about the related, pending Kama Appeal, presumably headed for a different Ninth Circuit merits panel, and the differing wording of the summary judgment order and decree of foreclosure there?

It is in the context of such an otherwise potential and disquieting lack of uniformity in application and

availability that federal rights are frequently interpreted by federal courts to enjoy an independent and uniform status in order to carry out the intentions of Congress under the Constitution's Supremacy Clause.

Judge Rosenberg in Smith was right.

d. The decision whether Hawaii case law does or does not automatically extinguish a borrower's extended TILA right to cancel because of a prior state foreclosure decree where a borrower's TILA rescission claims have not been pled or actually adjudicated there, should be -- and ultimately will have to be -- decided by the Hawaii Supreme Court and not by this Court which should avoid the possibility of conflicting decisions.

At the very least, should this Court decide that there is no federal preemption for TILA rescission claims, the *res judicata* issue should be certified by this Court for decision by the Hawaii Supreme Court, pursuant to Rule 13 of the Hawaii Rules of Appellate Procedure, the relevant provisions of which are set forth in the *Appendix* to this Petition, in the absence of any "clear controlling precedent in the Hawaii judicial decisions" to support the conclusions of the panel below and out of respect for the right of a State to interpret its own laws.

V. CONCLUSION

For all of the above reasons, Albanos and Menor pray that this Court will grant their separate Petitions for Writs of *Certiorari*, jointly review the decisions below, and reverse the dismissals of their individual federal Truth-In-Lending complaints so that they may have their day in court on the merits of their

cases and the full benefit of the consumer rights afforded them by the United States Congress and the Constitution of the United States of America.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioners
Warren Y.S.C. Albano and
Caroline C.S. Albano, and
for Petitioner Petra Menor

Honolulu, Hawaii
August 15, 2001

INDEX TO APPENDIX

	page
1. Published Opinion Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed March 30, 2001	A1
2. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed May 17, 2001	A7
3. Memorandum Decision Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed April 3, 2001	A8
4. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed May 17, 2001	A9
5. Article I, Section 8, Clause 3 Of The United States Constitution	A10
6. Article IV, Section 1, Of The United States Constitution	A10
7. Article VI, Clause 2 Of The United States Constitution	A10
8. Section 1635 Of Title 15 Of The United States Code	A10
9. Section 1738 Of Title 28 Of The United States Constitution	A11
10. Rule 13 Of The Hawaii Rules Of Appellate Procedure	A12

APPENDIX

1. Published Opinion Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed March 30, 2001

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Warren Y.S.C. Albano; Caroline C.S. Albano,	)	No. 99-16109 D.C. CV-97-00247-SPK
Plaintiffs-Appellees,	)	
v.	)	OPINION
Norwest Financial Hawaii, Inc.,	)	***Filed 3/30/01***
Defendant-Appellant.	)	

Argued and Submitted February 12, 2001

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge Fernandez

FERNANDEZ, Circuit Judge:

Warren Y.S.C. Albano and Caroline C.S. Albano appeal from the district court's granting of the motion of Norwest Financial Hawaii, Inc., for summary judgment. The district court determined that the doctrine of res judicata barred the Albanos' Truth in Lending Act claim for rescission of a real estate loan transaction with Norwest. See 15 U.S.C. §§ 1601-1667f (TILA). We affirm.

BACKGROUND

On March 15, 1994, the Albanos obtained a loan from Norwest which was secured by a mortgage on real property, which may have been the Albanos' principal residence.[1] At a later date, the loan was refinanced with Norwest and continued to be secured by the real property.

Thereafter, the Albanos defaulted and Norwest commenced judicial foreclosure proceedings on May 26, 1996. There is no dispute that the Albanos received notice of those proceedings. However, they failed to appear, their default was entered, and on January 13, 1997, the Hawaii Circuit Court issued findings of fact and conclusions of law, and entered judgment of foreclosure against them. It declared that the mortgage was valid, that it was foreclosed, and that the Albanos were "perpetually barred of and from any and all right, title, and interest in the mortgaged property." The judgment was declared to be final. The Albanos did not appeal.

Then, on March 12, 1997, the Albanos purported to rescind the 1994 loan on the basis that Norwest had not complied with TILA. See 15 U.S.C. § 1635. Norwest did not agree, and confirmation of the actual sale of the mortgaged property took place on August 19, 1997. However, on March 14, 1997, the Albanos had commenced this action. The district court ultimately determined that they could not maintain the action because they had not raised their TILA claim in the state foreclosure proceedings, although they could have done so. Thus, said the court, this action was barred by the principle of res judicata. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the TILA claim pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment on the basis of res judicata (claim preclusion) de novo. *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997).

DISCUSSION

[1] The Albanos had the opportunity to participate in the state court proceedings that resulted in a judgment against them. We must, of course, "'give the same preclusive effect to a state-court judgment as another court of that State would give [to it].'" Int'l Evangelical Church v. Church of the Soldiers, 54 F.3d 587, 590 (9th Cir. 1995) (citations omitted). Therefore, we must look to the law of the State of Hawaii in order to determine the res judicata effect of the foreclosure judgment. See *Migra v. Warren Guy Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56 (1984); *Sunkist Growers*, 104 F.3d at 283; *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990). Under the law of Hawaii:

> The doctrine of *res judicata* basically provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter and precludes the relitigation not only of issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."

Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (Sup. Ct. 1969) (citations omitted). In Hawaii the doctrine is applied in a robust way. That is based upon the Hawaii Supreme Court's insistence that parties should be spared unnecessary vexation, expense, and inconsistent results; that judicial resources shall not be wasted; and that the "legal efficacy" of final judgments shall not be undermined, but rather that final determinations "by competent tribunals shall be accepted as undeniable legal truth." *Id.* at 57, 451 P.2d at 822. Thus, while everyone is given the opportunity to present a case, that is "limited to one such opportunity." *Id.*

To serve those ends, the courts of Hawaii ask three questions when they seek to determine whether res judicata should apply to a case. Two of those questions are: "Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Morneau v. Stark Enters., Ltd.*, 56 Haw. 420, 424, 539 P.2d 472, 475 (Sup. Ct. 1975). Those two elements are met in this case. Clearly there was a final judgment by the state circuit court, which was not appealed. See *Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 464-65, 795 P.2d 276, 279 (Sup. Ct. 1990); see also *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992). It is equally pellucid that the Albanos and Norwest were parties to the state court foreclosure proceeding.

The other question asked by the courts in Hawaii requires a bit more analysis and discussion. It is: "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" Actually, when applied in the context of claim preclusion in Hawaii, this means that when a claim concerns the same subject matter, the doctrine applies if the issues "could have been raised in the

earlier state court actions." *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996); *see also Santos v. Hawaii, Dep't of Transp.*, 64 Haw. 648, 652-53, 646 P.2d 962, 965-66 (Sup. Ct. 1982) (per curiam); *Aloha Unlimited, Inc. v. Coughlin*, 79 Haw. 527, 537, 904 P.2d 541, 551 (Ct. App. 1995); *Fuller v. Pac. Med. Collections, Inc.*, 78 Haw. 213, 218-19, 891 P.2d 300, 305-06 (Ct. App. 1995). We recognize that the Albanos defaulted in state court, but that does not matter. "[A] default judgment is a final judgment to which" res judicata principles apply. *Fuller*, 78 Haw. at 219, 891 P.2d at 306. The only exception is for void judgments, and that does not apply here. *Id.*

[2) There can be no doubt whatsoever that the Albanos TILA claim could have been litigated in the foreclosure action. It was a defense that would have ineluctably precluded foreclosure if the Albanos' claims are meritorious. The Albanos' complaint asserts as much. Were there the slightest doubt about the Albanos ability to raise a TILA counterclaim in the state court proceedings, the Supreme Court of Hawaii has dispelled that doubt. It has held that when a party sought to assert a TILA counterclaim,

> [h]is allegations of TILA violations centered around appellee's failure to disclose fully certain aspects of the loan. These loans were the very ones that were the subject of appellee's claims . . . . [I]t seems "inescapable that credit terms are an integral part of a loan transaction." We find that appellant's claims arose out of the same loan transaction as appellee's suit and as such was a recoupment defense to diminish plaintiff's recovery.

Pac. Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 341, 614 P.2d 936, 940 (Sup. Ct. 1980) (citations

omitted). The Albanos, rather weakly, assert that in *Pac. Concrete* the provenance of the court's holding was a desire to help the debtor. Perhaps so, but legal principles often cut in two directions; if TILA claims arise out of the same transaction they do so for good or ill. The Albanos could have raised their defense in the state court action. They did not and it is now too late.[2] We do not, of course, decide what the result would be in a state where res judicata principles are enunciated or applied in a different manner. *See, e.g., Smith v. Wells Fargo Credit Corp.*, 713 F. Supp. 354, 357-59 (D. Ariz. 1989). We deal here with the preclusive effect of judgments entered in the courts of the State of Hawaii.

CONCLUSION

(3] Rights can be both powerful and transitory. If they are not asserted at the proper time, they may vanish forever. What was once puissant may become a mere simulacrum — an unreal shadow of its former self. So it is here. Once the Albanos allowed the state court to proceed to a final judgment of foreclosure against them any right they had to rescind the underlying mortgage transaction vanished. The district court did not err.

AFFIRMED.

---

1. There is a dispute about whether it was the Albanos' principal residence, but for purposes of this appeal we will assume that it was.

2. In an attempt to save their position, the Albanos point to *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 118 S.Ct. 1408, 140 L. Ed. 2d 566 (1998). However, *Beach* offers them no succor. That case simply held that the TILA rescission right has a limited — three year — life. *Id.* at 419, 118 S. Ct. at 1413. That fact

merely sets out the right's maximum life span; it does not affect procedural or substantive requirements that might end its existence even earlier.

2. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed May 17, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Warren Y.S.C. Albano; Caroline C.S. Albano,	)	No. 99-16109 D.C. CV-97-00247-SPK
Plaintiffs-Appellees,	)	
v.	)	ORDER DENYING PETITION FOR REHEARING AND
Norwest Financial Hawaii, Inc.,	)	FOR REHEARING EN BANC
Defendant-Appellant.	)	***Filed 5/17/01***

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

3. Memorandum Decision Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed April 3, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petra Menor,	) No. 99-16117
	) D.C. CV-98-00664-HG
Plaintiff-Appellee,	)
	) MEMORANDUM
v.	)
	) ***Filed 4/3/01***
Finance Factors, Limited,	)
	)
Defendant-Appellant.	)
	)

Argued and Submitted February 12, 2001

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

Petra D. Menor appeals from the district court's granting of the motion of Finance Factors, Limited for summary judgment. The district court determined that the doctrine of res judicata barred Menor's Truth in Lending Act claim for rescission of a real estate loan transaction with Finance Factors. See 15 U.S.C. 1601-16677f (TILA). In the preceding state foreclosure proceeding, Menor did not appear and raise the TILA claim.

We affirm for the reasons set forth in our opinion in Albano v. Norwest Fin. Haw., Inc., No. 99-16109, slip. op. 4085 (9th Cir. Mar. 30, 2001).

AFFIRMED.

4. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed May 17, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petra Menor,	) No. 99-16117
	) D.C. CV-98-00664-HG
Plaintiff-Appellee,	)
	) ORDER DENYING
v.	) PETITION FOR
	) REHEARING AND
Finance Factors, Limited,	) FOR REHEARING
	) EN BANC
Defendant-Appellant.	)
	) ***Filed 4/3/01***

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

5. Article I, Section 8, Clause 3
Of The United States Constitution

The Congress shall have the Power . . .To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

6. Article IV, Section 1
Of The United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

7. Article VI, Clause 2
Of The United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8. Section 1635
Of Title 15 Of The United States Code

(a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of

the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later . . .

(b) Return of money or property following rescission. When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor . . . becomes void upon a rescission. . . .

(f) Time limit for exercise of right. An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor . . . .

9. Section 1738
Of Title 28 Of The United States Code

. . .[State] Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

10. Rule 13 Of The Hawaii Rules Of Appellate Procedure

(a) When certified. When a federal district court or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it as question concerning the law of Hawaii that is determinative of the cause and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court my answer the certified question by written opinion.

(b) *Contents of certificate*. The certificate provided for herein shall contain the title of the Hawaii Supreme Court and the title of the cause in full, and to the right thereof the words "Certified Question" and the name of the court submitting or approving the submission of the question. . . .

(c) *Preparation of certificate*. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of such federal court, it shall be certified to the Hawaii Supreme Court by the clerk of the federal court and under its official seal. . . .